

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PRISON LEGAL NEWS,

CASE NO. C14-479 MJP

Plaintiff,

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT, DENYING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, et al.,

Defendants.

THIS MATTER comes before the Court on the Parties' cross-motions for summary judgment. (Dkt. Nos. 24, 28.) Having considered the Parties' briefing and the related record, the Court hereby GRANTS Plaintiff's Motion for Summary Judgment (Dkt. No. 24) and DENIES Defendants' Cross-Motion for Summary Judgment (Dkt. No. 28).

Background

Plaintiff Prison Legal News, a monthly news magazine dedicated to reporting and advocacy concerning the elevated telephone rates that prisons and contractors charge incarcerated people, brings suit against the Department of Homeland Security (“DHS”) and

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JUDGMENT- 1**

1 Immigration and Customs Enforcement (“ICE”) alleging that various actions taken by
 2 Defendants have violated the Freedom of Information Act (“FOIA”). (Dkt. No. 33.)

3 Prison Legal News is a project of the Human Rights Defense Center (“HRDC”), a
 4 nonprofit charitable organization that focuses on “public education, prisoner education, advocacy
 5 and outreach in support of the rights of prisoners and in furtherance of basic human rights.”
 6 (Dkt. Nos. 24 at 7, 25 at 1-3.) For several years, Plaintiff and HRDC have been gathering
 7 information through public records requests about prison phone policies and practices, with
 8 special focus on identifying where prisoners are charged high rates for basic telephone services.
 9 (Dkt. No. 25 at 1-3.) In 2013, HRDC staff members testified before the Federal
 10 Communications Commission (“FCC”) about capping prison phone rates, and the FCC cited
 11 Plaintiff and HRDC more than forty-five times in its report and order implementing new
 12 regulations of prison telecommunications companies. (Dkt. No. 25 at 59-189.) Plaintiff’s FOIA
 13 records requests in this case also sought information related to telephone practices and policies as
 14 part of the same investigative project, this time targeted towards ICE’s federal immigration
 15 detention centers. (Dkt. Nos. 24 at 7-9, 25 at 1-3.)

16 Plaintiff’s first FOIA request was mailed to Defendants on July 30, 2013, and was signed
 17 for by Defendants on August 5, 2013. (Dkt. No. 25 at 3, 213-17.) Plaintiff asserts that it never
 18 received a response to this request. (*Id.* at 3.) Defendants assert that they issued a request
 19 acknowledgment letter on August 7, 2013, and have produced evidence that a responsive letter
 20 was generated, though not that it was mailed. (Dkt. Nos. 29 at 4, 29-1.) Regardless of whether
 21 the response letter was sent or not, Plaintiff informed Defendants by letter dated December 21,
 22 2013, that Plaintiff had not received any response but remained interested in the information.

1 (Dkt. No. 25 at 3, 219.) It is uncontested that Defendants received but did not respond to the
 2 second letter. (Id.)

3 On April 2, 2014, Plaintiff filed this suit, alleging that Defendants were violating FOIA
 4 by failing to respond to its two requests. (Dkt. No. 1.) Plaintiff then received the first round of
 5 responsive records from ICE on August 1, 2014. (Dkt. Nos. 25 at 3-4, 29.) In the months
 6 between September 2014 and February 2015, ICE produced several additional rounds of records
 7 and several rounds of reprocessed and corrected records. (Id.)

8 Portions of the produced records were redacted pursuant to FOIA Exemptions 4
 9 (confidential commercial information), 6 (personal privacy), 7(C) (law enforcement personal
 10 privacy), and 7(E) (law enforcement techniques and procedures). (Dkt. Nos. 25 at 3-4, 29 at 12.)
 11 In January 2015, Plaintiff amended its complaint to clarify that it sought to challenge not only
 12 ICE's failure to timely respond to its FOIA requests (the only disputed issue at the time the suit
 13 was filed), but also ICE's Exemption 4 and 7(E) redactions in the documents produced by ICE
 14 between August and December 2014. (Dkt. Nos. 24 at 11, 33.)

15 After Plaintiff amended its complaint and filed its motion for summary judgment arguing
 16 that Defendants had failed to properly respond to its FOIA requests and had improperly redacted
 17 non-exempt public information under Exemptions 4 and 7(E), ICE determined that information
 18 redacted pursuant to Exemption 7(E) "had previously been publicly disclosed," and thus
 19 produced the unredacted documents in full. (Dkt. No. 28 at 2 n.1.)

20 Accordingly, the only remaining issue regarding redactions involves ICE's Exemption 4
 21 redaction of Talton Communications, Inc.'s performance incentive rate, which reflects a
 22 percentage of revenue earned by the phone services contractor that is set aside in escrow and
 23 only paid to the contractor upon ICE's determination that Talton has performed the contract

1 successfully. (Dkt. Nos. 28, 36.) ICE redacted the incentive rate used by Talton in its successful
 2 2009 contract bid because it determined that disclosing the rate would result in competitive harm
 3 to Talton when it bids for subsequent contracts, including the contract to be bid for in 2015.
 4 (Dkt. Nos. 28, 37.) Plaintiff contends the rate was improperly redacted because this information
 5 is not exempt under proper application of Exemption 4. (Dkt. Nos. 24, 36.)

6 **Discussion**

7 I. Legal Standard

8 Summary judgment is proper where “the movant shows that there is no genuine issue as
 9 to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
 10 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue
 11 of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In assessing whether a party has met
 12 its burden, the underlying evidence must be viewed in the light most favorable to the non-
 13 moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

14 The Court conducts a de novo review of an agency's response to a FOIA request. 5
 15 U.S.C. § 552(a)(4)(B); U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S.
 16 749, 755 (1989). When presented with a summary judgment motion in a FOIA case, courts
 17 follow a two-step inquiry. See, e.g., Los Angeles Times Commc'ns, LLC v. U.S. Dep't of the
 18 Army, 442 F. Supp. 2d 880, 892-94 (C.D. Cal. 2006). First, courts evaluate whether the agency
 19 has met its burden of proving that it fully discharged its obligations under FOIA. Zemansky v.
 20 EPA, 767 F.2d 569, 571 (9th Cir. 1985) (citing Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344,
 21 1350-1351 (D.C. Cir. 1983)). To do this, the agency must demonstrate that it has conducted a
 22 search reasonably calculated to uncover all relevant documents. Id. Second, if the agency
 23 satisfies its initial burden, courts determine whether the agency has proven that the information

1 that it did not disclose falls within one of the nine FOIA exemptions. Dobronski v. FCC, 17 F.3d
 2 275, 277 (9th Cir. 1994). In meeting its burden, the government may not rely on conclusory and
 3 generalized allegations of exemptions. Church of Scientology of Cal. v. U.S. Dep't of the Army,
 4 611 F.2d 738, 742 (9th Cir. 1980) (citing Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973)).
 5 Furthermore, these exemptions “must be narrowly construed” so as not to undermine FOIA’s
 6 basic purpose: “to ensure an informed citizenry, vital to the functioning of a democratic society,
 7 needed to check against corruption and to hold the governors accountable to the governed.” John
 8 Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (internal quotation marks and citations
 9 omitted).

10 In sum, in order to prevail on summary judgment, the agency must prove “it has fully
 11 discharged [these burdens] under FOIA, after the underlying facts and the inferences to be drawn
 12 from them are construed in the light most favorable to the FOIA requester.” Miller v. U.S. Dep't
 13 of State, 779 F.2d 1378, 1382 (8th Cir. 1985) (citing Weisberg, 705 F.2d at 1350); see also
 14 Zemansky, 767 F.2d at 571.

15 II. Redactions Pursuant to Exemption 4

16 Plaintiff argues that Defendants cannot meet their burden of proving that Talton
 17 Communications is likely to suffer substantial competitive harm if the performance incentive rate
 18 from its successful 2009 detainee telephone services contract bid is disclosed, and therefore that
 19 the performance incentive rate is not exempt from disclosure. (Dkt. Nos. 24 at 16, 36 at 5-8.)

20 The trade secret exemption to FOIA states, “[t]his section does not apply to matters that
 21 are (4) trade secrets and commercial or financial information obtained from a person and
 22 privileged and confidential.” 5 U.S.C. § 552(b). “In order to invoke Exemption 4 in the Ninth
 23 Circuit, the government agency must demonstrate that the information it sought to protect is (1)

1 commercial and financial information, (2) obtained from a person or by the government, (3) that
 2 is privileged or confidential.” Watkins v. U.S. Bureau of Customs & Border Prot., 643 F.3d
 3 1189, 1194 (9th Cir. 2011) (internal quotations marks omitted). Commercial or financial
 4 information is “confidential” for purposes of the exemption if disclosure of the information is
 5 likely to have either of the following effects: “(1) to impair the Government's ability to obtain
 6 necessary information in the future; or (2) to cause substantial harm to the competitive position
 7 of the person from whom the information was obtained.” Id.

8 Where, as here, resolution of the issue before the Court turns on the “substantial harm”
 9 prong, the government need not show that releasing the information would cause “actual
 10 competitive harm.” Watkins, 643 F.3d at 1194. Rather, the government need only show that
 11 there is: “(1) actual competition in the relevant market, and (2) a likelihood of substantial
 12 competitive injury if the information were released.” Id. “Competitive harm analysis is ...
 13 limited to harm flowing from the affirmative use of proprietary information by competitors.
 14 Competitive harm should not be taken to mean simply any injury to competitive position....
 15 Although the court need not conduct a sophisticated economic analysis of the likely effects of
 16 disclosure[,] ... [c]onclusory and generalized allegations of substantial competitive harm ... are
 17 unacceptable and cannot support an agency's decision to withhold requested documents.” Id. at
 18 1195 (internal quotation marks and citations omitted).

19 Defendants argue that disclosure of the performance incentive rate would result in
 20 substantial competitive harm to Talton Communications and would undermine the integrity of
 21 the bidding process for ICE's future telephone services contracts because Talton's competitors
 22 could use the information to underbid Talton. (Dkt. No. 28 at 13-16.) Defendants contend that
 23 ICE considered three factors in awarding the 2009 telecommunications contract—(1) technical

1 and management capabilities, (2) past performance, and (3) price—and that Talton was
2 successful in securing the 2009 contract because it offered the lowest price proposal that was
3 technically acceptable. (Dkt. Nos. 28 at 14, 32 at 2-7, 38 at 6-8.) Included in the price proposal
4 were the telephone rates to be charged to detainees—which are now posted publicly at ICE’s
5 Northwest Detention Center and which were already disclosed to Plaintiff—and the performance
6 incentive rate. (Id.) Defendants submit that because Talton’s telephone rates are available to its
7 competitors, the “only competitive edge Talton still has over its competitors in future bids is its
8 strategy regarding the percentage of the revenue the company agreed to set aside as a
9 performance incentive in order to win the current Detainee Telephone System contract.” (Dkt.
10 No. 32 at 7.) Defendants also note that Talton invested considerable resources, including hiring
11 an outside consultant, to develop an attractive bid for the 2009 contract, which included
12 developing a “risk allocation approach” that Defendants contend would be revealed if the
13 performance incentive rate were disclosed. (Dkt. Nos. 28 at 14-15, 31 at 1-6.)

14 Defendants have not met their burden of demonstrating a likelihood of substantial
15 competitive injury to Talton upon disclosure of its 2009 performance incentive rate, and
16 therefore the performance incentive rate is not exempt from disclosure under FOIA. Defendants
17 base their arguments on the theory that disclosing Talton’s 2009 performance incentive rate
18 would expose Talton’s current risk tolerance, without reciprocal disclosures from its competitors,
19 therefore providing competitors with an unfair advantage in the bidding process for upcoming
20 contracts by allowing them to estimate and undercut Talton’s bids. (Dkt. Nos. 28 at 14, 31 at 3-
21 6, 32 at 5-7, 37 at 4, 38 at 6-8). But the performance incentive rate to be disclosed would reveal
22 only Talton’s risk tolerance in 2009, based on the state of the company then, as evaluated by a
23 consultant hired to craft a bid specifically for the 2009 contract. (See Dkt. No. 31.) There is no

1 indication in the record that Talton Communications in 2015 is in exactly the same financial
 2 position as it was in 2009; Talton today may have a higher or lower risk tolerance than it did in
 3 2009. Because Talton is free to determine its current risk tolerance separate from its 2009 risk
 4 tolerance, disclosure of the 2009 rate will not provide Talton's competitors with insight into its
 5 future bids for future contracts. In other words, disclosure of the 2009 rate, without more, does
 6 not allow competitors to "estimate and undercut" Talton's 2015 bid because there is no
 7 indication that Talton will use the same rate in 2015.¹ Furthermore, Defendants have provided
 8 neither evidence nor argument to explain how disclosure of the 2009 rate would allow
 9 competitors to reverse engineer Talton's entire business strategy or its current or future risk
 10 tolerance.

11 Moreover, the record does not support Defendants' contentions that the performance
 12 incentive rate was the "single distinguishing and important element of Talton's 2009 [detainee
 13 telephone services] proposal which allowed Talton to win the award and will likely be just as
 14 significant should Talton choose to compete for the follow-on [detainee telephone services]
 15 contract." (Dkt. No. 37 at 4.) Rather, the record shows that price was the deciding factor in
 16 2009, and that the performance incentive rate was one piece of Talton's price proposal. (Dkt.
 17 Nos. 32 at 2-7, 38 at 6-8.) The record also shows that ICE evaluates a variety of factors when
 18 choosing between proposals, and that the importance of any one of the factors fluctuates
 19 according to ICE's evaluation of the proposal's other factors and sub-factors. (Id.) ICE has
 20 identified eight sub-factors for the technical and management capabilities category alone. (Dkt.
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22 ¹ Furthermore, it is unclear from the record when bidding for the 2015 contract is
 23 expected to take place, and in fact it may have already occurred. The Parties have specified that
 24 Talton's 2009 contract expired on May 12, 2015, (Dkt. No. 38 at 5), but have not specified when
 a new contract will be bid for or will enter into effect.

1 No. 32 at 4.) That a contractor's performance incentive rate will be the single determinative
 2 factor in a future bidding process is pure speculation, and, in light of "the strong public interest
 3 in favor of disclosure," GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109, 1115 (9th
 4 Cir. 1994), cannot support a finding that Talton is likely to sustain substantial competitive harm
 5 from disclosure of the performance incentive rate.

6 In sum, the Court finds that Talton's performance incentive rate is not exempt from
 7 disclosure under FOIA because Defendants have not demonstrated a likelihood of substantial
 8 competitive injury to Talton if the rate were disclosed. Defendants must therefore disclose the
 9 rate to Plaintiff.

10 III. Excessive Delay in Responding to Requests

11 Plaintiff argues that, in addition to improperly redacting documents, Defendants violated
 12 FOIA by failing to timely respond to its FOIA requests. (Dkt. Nos. 24 at 11-13, 36 at 3-5.)
 13 Plaintiff requests that the Court declare that ICE's delay in responding has violated the letter and
 14 spirit of FOIA. (Id.) Defendants admit that they failed to timely respond to Plaintiff's requests,
 15 but argue that that failure was inadvertent and that Plaintiff has already availed itself of the
 16 proper remedy for that failure—filing suit for immediate judicial review without having to
 17 exhaust administrative remedies. (Dkt. Nos. 28 at 16-17, 37 at 7-8.)

18 FOIA requires an agency to, within twenty days of receiving a record request, (1)
 19 determine whether it will comply with a record request, and (2) notify the requester of its
 20 determination and its reasoning. 5 U.S.C. § 552(a)(6)(A)(i). The determination response must
 21 include: (1) a statement of what the agency will and will not release; (2) the agency's rationale
 22 for any withholdings; and (3) notice of the requester's right to appeal. Id. Where "unusual

1 "circumstances" exist, the Act allows agencies to extend that deadline by as many as ten days. 5
 2 U.S.C. § 552(a)(6)(B)(i).

3 Declaratory judgment, the granting of which is within the discretion of the Court, is
 4 proper when there are purely legal questions at issue and if the judgment will clarify the legal
 5 issues and provide clarity to the parties and the public. Natural Res. Def. Council, Inc. v. EPA,
 6 966 F.2d 1292, 1299 (9th Cir. 1992) (granting declaratory relief because the agency "does not
 7 have the authority to ignore unambiguous deadlines set by Congress" in Clean Water Act case).

8 Defendants correctly note that where an agency fails to respond within the statutory time
 9 period, the requestor is deemed to have constructively exhausted his or her administrative
 10 remedies and may file suit in federal court. (Dkt. No. 37 at 7) (citing 5 U.S.C. § 552(a)(6)(C)
 11 and Citizens for Responsibility and Ethics in Wash. v. FEC, 711 F.3d 180, 188 (D.C. Cir. 2013).)
 12 Exhaustion of administrative remedies aside, "[i]t seems fair to say that in the Ninth Circuit,
 13 courts sometimes enforce FOIA's timeliness requirements independent of the underlying
 14 disclosure issues, at least when the violation is 'egregious' or when there is a 'pattern or practice'
 15 of delay." Munger, Tolles & Olson LLP ex rel. Am. Mgmt. Servs. LLC v. U.S. Dep't of Army,
 16 58 F. Supp. 3d 1050, 1054-55 (C.D. Cal. 2014) (collecting cases). See, e.g., Oregon Natural
 17 Desert Ass'n v. Gutierrez, 409 F. Supp. 2d 1237, 1247-48 (D. Or. 2006) (holding that an eight
 18 month delay was "a violation of FOIA, regardless of the final outcome of the request").

19 The Court finds the delay in responding to Plaintiff's requests to be egregious. It is
 20 uncontested that Plaintiff did not receive ICE's first production of documents (or any other
 21 determination) until 361 days after mailing its first FOIA request letter, seven months after
 22 mailing its second request letter, and almost four months after filing this lawsuit. (Dkt. Nos. 25
 23 at 2-4, 29 at 12-14.) Production of the remainder of the requested documents was not completed
 24

1 for several additional months. (*Id.*) Response times of this sort clearly exceed the unambiguous
2 time allowance contemplated by Congress. See 5 U.S.C. § 552(a)(6)(A)(i). Consequently, the
3 Court hereby declares that, independent of the exemption issues, Defendants violated FOIA by
4 failing to make a timely determination on Plaintiff's requests.

5 **IV. Attorney's Fees**

6 As the prevailing party, Plaintiff is eligible for reasonable attorney's fees and costs. 5
7 U.S.C. § 552(a)(4)(E); Church of Scientology of Cal. v. U.S. Postal Serv., 700 F.2d 486, 489
8 (9th Cir. 1983). The Court finds that an award of fees and costs is appropriate in this case, and
9 that Plaintiff is entitled to such an award. See Church of Scientology of Cal., 700 F.2d at 492-
10 93. Therefore, Plaintiff is hereby awarded reasonable attorney's fees and costs, and must
11 petition the Court for a determination of fees and costs within thirty (30) days of the date of this
12 order, if the Parties are unable to agree on a determination.

13 **Conclusion**

14 Because Defendants have violated FOIA by failing to timely respond to Plaintiff's
15 requests and have failed to prove that Talton's performance incentive rate falls within one of
16 FOIA's exemptions, the Court GRANTS Plaintiff's Motion for Summary Judgment and
17 DENIES Defendants' Cross-Motion for Summary Judgment. Plaintiff is awarded reasonable
18 attorney's fees and costs, in an amount to be determined later should the Parties be unable to
19 agree on a determination.

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1 The clerk is ordered to provide copies of this order to all counsel.
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5 Dated this 18th day of June, 2015.
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17 Marsha J. Pechman
18 Chief United States District Judge
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